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No. 96-1824

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GARY LEE, M.D., et al.,
Petitioners,
v.
F. DOUGLASS HARCLEROAD, et al.,
Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION
filed by
GOODWIN, M.D., COOMBS LEE AND SINNARD

ELI D. STUTSMAN
Counsel of Record
1900 Standard Insurance Center
900 S.W. Fifth Avenue
Portland, OR 97204
(503) 274-4048

September 2, 1997

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QUESTION PRESENTED

Whether the facts in this record establish that plaintiffs personally will suffer an imminent, concrete, and non-speculative injury sufficient to give them standing to challenge Oregon's Death With Dignity law.

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INTRODUCTION

Respondents are the three chief petitioners who sponsored the Oregon Death With Dignity Act in 1994.[1] Respondents have reviewed the State of Oregon's brief in opposition to the petition for writ of certiorari and join in all aspects contained therein, including the question presented. Respondents make the following additional points.

STATEMENT OF JURISDICTION

While plaintiffs may be properly before this court on procedural grounds, the "case" or "controversy" requirements of Article III are not met.

STATEMENT OF THE CASE

The Oregon Death With Dignity Act (Act), codified at Or. Rev. Stat. 127.800 *et seq.*, was passed into law by Oregon voters on November 8, 1994.[2] It establishes the statutory framework

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[1] *See* Or. Rev. Stat. 250.045 (chief petitioners required to initiate a measure).

[2] Article IV, section 1, of the Oregon Constitution provides, in part:

> The legislative power of the state, *except for the initiative and referendum powers reserved to the people*, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives [emp. supp.].

For purposes of constitutional review, it is irrelevant that the voters rather than the state legislature enacted the statute. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981).

within which a competent dying adult patient may legally request a prescription for medication "for the purpose of ending his or her life in a humane and dignified manner." §2.01, Pet. Cert., 22a. Under Oregon's Constitution, the Act would have taken effect on December 8, 1994, thirty days after the November 8 election in which it was adopted by a majority of voters. Or. Const., Art. IV, § 1(4)(d).

However, on November 23, 1994, fifteen days after the election and fifteen days before the Act would have taken effect, plaintiffs filed a complaint seeking declaratory and injunctive relief. Plaintiffs alleged that the Act violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution (Counts One, Two and Four), statutory and First Amendment rights of freedom to exercise religion and to associate (Count Five), and the Americans with Disabilities Act (Count Three). *See* Third Amended Complaint.

The district court prevented the Act from taking effect, first by issuance of a temporary restraining order on December 7, 1994, then by issuance of a preliminary injunction on December 27, 1994, and then by issuance of a declaratory judgment and permanent injunction entered August 3, 1995. Although the district court was reversed by the court of appeals, the court of appeals nonetheless stayed its mandate pending further review by this Court. Almost three years later, the voter-approved Act has never been implemented.[3]

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[3]More Oregon voters voted on the Act than voted for anything else on the ballot that year, including the gubernatorial races combined. *Source*: 1995-96 Oregon Blue Book, pp. 327, 354 (complied and published by Phil Keisling, Secretary of State, State of Oregon).

REASONS TO DENY THE WRIT

A. Introduction

On this appeal, issues of jurisdiction, including standing and ripeness, are not only threshold, they are dispositive. Because the Act was never implemented, the pre-litigation facts are not extensive. To the extent that such facts exist, they cut against plaintiffs' claim of standing. *See* State of Oregon's Brief in Opposition, 1-7.

B. Plaintiff Janice Elsner

In their first question presented, plaintiffs mislead the Court, arguing that:

> Janice Elsner is dying. Recurring clinical depression makes her vacillate between wanting suicide and life.

See Pet. Cert., i.

Ms Elsner is not terminally ill now, and she may not be for another ten years. *See* State's Brief, 4. Nor is there any evidence in the record that Ms Elsner "vacillate[s] between wanting suicide and life." *See* State's Brief, 1-7. Plaintiffs' first question is an incredible distortion of the record on this appeal.

1. No Future Injury

In its opposition brief, the State fully details the complete lack of any future injury to plaintiffs. That effort will not be

repeated here. It may be instructive to note, however, that although standing has repeatedly been raised as a defense throughout this litigation,[4] plaintiffs treat standing in a secondary fashion. For example, in the court of appeals, it was not until page 49 of their brief that plaintiffs first addressed the issue of standing, and that response was superficial, arguing that "the matter is really quite simple" because the "*empirical* facts" reveal that:

> (1) persons with a terminal disease are at a greatly increased risk for depression; (2) depression carries with it a serious risk of becoming suicidal; and (3) primary care physicians regularly miss suicidal depression in their own patients.

Appellees' Brief, at 49 (emp. supp.).

For this Court to find standing on these *empirical non-individualized* "facts" would result in an unprecedented expansion of the standing doctrine; a dream come true for federal court plaintiffs. Although plaintiffs continue to advance their multi-link speculative arguments (*see e.g.*, Pet. Cert., 21), they have also attempted to recast their case as one having *individualized* facts. It is due to the complete paucity of any individualized facts, however, that the State so readily dismantles plaintiffs' claim of standing. In sum, plaintiffs argument in support of an individualized, imminent, concrete, and non-speculative injury is

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[4]In the trial court, *see* defendants' motions to dismiss (CR 58), motions to stay and/or modify (CR 92, 95), and motions for summary judgment (CR 150), all of which asserted plaintiffs' lack of Article III "case or controversy," standing, and ripeness. In the court of appeals, *compare* Appellants' Brief (filed by Goodwin, Coombs Lee and Sinnard), pp. 11-24 *with* Appellees' Brief, pp. 49-50.

either speculative (as it was in the court of appeals), or misleading (as it is before this Court).[5]

2. No Present Injury

It is perhaps because plaintiffs lack an imminent, concrete, and non-speculative *imminent* injury that plaintiffs attempt, now more than ever, to establish an individualized *present* ("stigmatic") injury. The State fully rebuts plaintiffs' claim of a present injury (*see* State's Brief, 18-21) and, once again, that effort will not be repeated here. Plaintiffs have, however, committed an error of fact and law that must be corrected.

a. The Standard of Care

In an attempt to claim a present "stigmatic" injury, plaintiffs argue that under section 4.01 of the Act, the standard of care for terminally ill patients is lowered from the objective reasonable standard of care to the subjective good faith standard of care.[6] Pet. Cert., 4. This theme runs throughout plaintiffs'

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[5]Why then, one might ask, is Ms Elsner involved in this litigation? The record reveals that Ms Elsner is politically opposed to the Act, that she worked to defeat it during the 1994 campaign, and that her participation in this litigation was a continuation of that effort. *See* State's Brief, 6. While such an admission is not dispositive on the issue of standing, it does explain how Ms Elsner came to be a plaintiff without an injury.

[6]Section 4.01 of the Act (immunities) provides:

> (1) No *person* shall be subject to civil or criminal liability or professional disciplinary action for participating in *good faith* compliance with this Act. This includes being present when a qualified patient takes the prescribed medication * * * .

Pet. Cert., 30a (emp. supp.).

petition. *See* Pet. Cert., 2, 4, 8-9, 10-12, 15-16, 19, 22, 25, 29-30. At one point, plaintiffs even argue that:

> This reduced standard of care [good faith] applies to the *diagnoses of whether a person is terminally ill* (having less than six months to live).

See Pet. Cert., 4 (fn omitted, emp. supp.).

Plaintiffs are wrong and this is a careless assertion, for the Act expressly provides that reasonable medical judgment is required when making a diagnosis that a patient is terminally ill:

> "Terminal disease" means an incurable and irreversible disease that has been medically confirmed and will, within *reasonable medical judgment*, produce death within six (6) months.

See §1.01(12), Pet. Cert., 22a (emp. supp.).

Consequently, the subjective good faith standard of care does not apply to the diagnosis of terminal illness. Moreover, the standard of care is not lowered in any instance under the Act.

b. Statutory Interpretation

Oregon has a well established body of law that governs statutory interpretation. When interpreting a statute, the court's task is to discern the intent of the legislature. Or. Rev. Stat. 174.020. To determine legislative intent, the court first examines the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-612, 859 P.2d 1143 (1993) (explaining

methodology). If, after doing so, using aids to statutory construction that bear directly on the interpretation of the text of the statute within its context, the legislative intent is unclear, the court considers legislative history. *Id.*, at 611-12. If after consideration of text, context, and legislative history, the intent of the legislature remains unclear, the court may then resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Id.*, at 612; *see also*, *Huff v. Great Western Seed Co.*, 322 Or. 457, 909 P.2d 558 (1995) (reversing three prior decisions that failed to abide by this methodology). This approach to statutory interpretation applies equally to laws enacted by the legislature and the people. *See e.g., Roseburg School Dist. v. City of Roseburg*, 316 Or. 374, 378-379 & n 5, 851 P.2d 595 (1993).

The first level of analysis, the text of the statute itself, is the starting point; it provides the best evidence of the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or. at 610. In the instant case, the text of the Act expressly provides that "reasonable medical judgment" must be exercised when diagnosing a terminal disease. §1.01(12), Pet. Cert., 22a. Elsewhere the Act also provides that "[n]o *person* shall be subject to civil or criminal liability or professional disciplinary action for participating in *good faith* compliance with this Act." *See* §4.01 (quoted fully in fn 6 *supra*), Pet. Cert., 30a (emp. supp.).

The issue then is how to interpret section 1.01(12) (reasonable medical judgment) and section 4.01(1) (good faith compliance). One solution is to adopt the approach assumed here by plaintiffs, *i.e.*, allow the words "good faith compliance" to negate the words "reasonable medical judgment." This interpretation, however, is inappropriate, for a court may not insert what

has been omitted or omit what has been inserted. Rather, the court must give effect to all words. *See* Or. Rev. Stat. 174.010.[7]

Another aid to statutory interpretation compels the same result. Or. Rev. Stat. 174.020 provides that a specific intent shall control a general one.[8] Here the specific intent is that a physician shall exercise "reasonable medical judgment." §1.01(12), Pet. Cert., 22a. The general intent is that persons who act in "good faith compliance" are immune from liability. §4.01, Pet. Cert., 30a. Because the specific intent controls the general intent, the specific requirement of reasonable medical judgment must be given effect. For this additional reason, plaintiffs' interpretation is wrong.

It is instructive to note that where the Act refers to "good faith compliance," it is referring to *persons* generally. This makes sense because the Act, construed as a whole, contemplates all persons who might participate, professionals and nonprofessionals alike. However, where the Act refers to what is obviously one of

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[7]Or. Rev. Stat. 174.010 provides:

> **General rule for construction of statutes.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, *or to omit what has been inserted*; and where there are several provisions or particulars such construction is, if possible, to be adopted as will *give effect to all* [emp. supp.].

[8]Or. Rev. Stat. 174.020 provides:

> **Legislative intent; general and particular provisions and intents.** In the construction of a statute the intention of the legislature is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.

the many roles fulfilled by a physician, then the act requires "reasonable medical judgment." Contrary to plaintiffs' argument, nowhere does the Act suggest that the "good faith" requirement of §4.01 is a substitute for the applicable standard of care for physicians, pharmacists, nurses, or any other health care provider who might choose to participate under the Act.[9]

Assuming *arguendo* that a lower standard of care does apply to physicians, and further assuming that the lower standard or care creates a constitutional problem ("stigmatic" injury) (and the State has fully rebutted this point), the appropriate solution is to sever the offending provision (*i.e.,* sever the words "good faith"). The Act contains a severability clause:

> Any section of this Act being held invalid as to any *person or circumstance* shall not affect the application of any other section of this Act which can be given full effect without the invalid section or application.

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[9]Medical malpractice cases are simply negligence actions against medical professionals. *Rogers v. Meridian Park Hospital*, 307 Or. 612, 619, 772 P.2d 929 (1989). The fundamental issue, as in all negligence cases, is whether the defendant breached the standard of care. *Id.* Plaintiffs correctly point to Or. Rev. Stat. 677.095 as the standard of care in Oregon. Pet. Cert., 12. That statute merely codifies the common law of negligence, *id.*, which requires that a physician exercise the applicable standard of "reasonable care." *Whinston v. Kaiser Foundation Hospital*, 93 Or. App. 528, 531-532, 763 P.2d 177 (1988).

To prevail in a medical malpractice case, the plaintiff must establish (1) the degree of care, skill and diligence used by ordinarily careful physicians in the same or similar circumstances; (2) that the defendant failed to use "*reasonable*" care; and (3) that as a result of the defendant's failure to exercise "*reasonable*" care the plaintiff suffered injuries. *Zacher v. Petty*, 103 Or. App. 8, 14, 797 P.2d 1042 (1990) (applying Or. Rev. Stat. 677.095); *rev on othr grnds*, 312 Or 590 (1992).

See §5.01, Pet. Cert., 31a (emp. supp.).

Consequently, if the words "good faith" offend the Constitution, the appropriate solution is to sever them from the Act. Indeed, this is required by Oregon law. *See* Or. Rev. Stat. 174.040 (severability).[10]

In sum, while applying any one (or all three) of the above statutory aids to interpretation to the text and context of the Act, one thing is obvious: the interpretation urged here by plaintiffs (lowered standard of care) is impermissible.

Plaintiffs must lose this argument for yet another reason. Oregon courts are "committed to the proposition that statutes are to be construed so as to satisfy the constitution unless no other construction is possible." *See State v. Lajoie*, 316 Or. 63, 95, 849 P.2d 479 (1993); *see also, State v. Buttrey*, 293 Or. 575, 596, 651 P.2d 1075 (1982) ("it is our obligation to avoid interpreting statutes in a way that creates serious doubts of their constitutionality"); *Bernstein Bros. v. Dept. of Rev.*, 294 Or. 614, 621, 661 P.2d 537 (1983) ("we should construe and interpret statutes in such a manner as to avoid any serious constitutional problems"). Federal courts

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[10]Or. Rev. Stat. 174.040 provides:

> **Severability.** It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining part shall remain in force unless:
>
> (1) The statute provides otherwise;
>
> (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> (3) The remaining parts, standing alone, are incomplee and incapable of being executed in accordance with the legislative ntent.

do the same. *Communications Workers v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) ("federal statutes are to be construed so as to avoid serious doubts as to their constitutionality").

The requirement that courts should implement and preserve a statute, as opposed to imagining reasons to defeat it, is so compelling that Oregon courts will reverse their own precedent to avoid a newly recognized constitutional violation. *Hunter v. State of Oregon*, 84 Or. App. 698, 703, 735 P.2d 1225 (1987) *rev on othr grnds*, 306 Or. 529 (1988) (overturning three prior decisions that interpreted a statute giving rise to a constitutional problem). Admittedly, this approach does not suit plaintiffs' needs, because they seek only to defeat the statute.[11]

C. Plaintiffs/Drs. Gary Lee and William Petty

1. No Patients

In their second question presented, plaintiffs again mischaracterize the record when they state that "Drs. Gary Lee and William Petty assert their terminally ill patients' interests * * * ." *See* Pet. Cert., i. No such patient has ever been identified by name or profile, in the district court, in the court of appeals, or in this

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[11]Ironically, history demonstrates that once this Act is implemented, opponents will work to interpret it narrowly, restricting its scope and placing as many hurdles between patients and physicians as possible. At the same time, opponents will also seek to interpret the Act so as to create the greatest protections for patients and the greatest liabilities for professionals. Such is the political reality of social issues litigated in the courts. For the time being, however, in order to defeat the statute, plaintiffs work in the opposite direction, seeking to interpret the Act so as to harm themselves, in a misguided effort to claim an Article III injury.

proceeding. Indeed, no patient has ever requested that either doctor represent their interests. (CR 139-147; CR 149; CR 150).

As pointed out by the State, Drs. Lee and Petty are themselves personally opposed to the Act (*see* State's Brief, 6) and that is why they are plaintiffs in this litigation. This Court has, however, made clear that standing "is not to be placed in the hands of concerned bystanders who will use it simply as a vehicle for the vindication of value interests." *Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (internal quotation marks omitted). Attempts by doctors Lee and Petty to recast their involvement on appeal to suggest that they are representing certain patients is pre-textual and "trivializes our concern with confining standing to effective proponents of third-party rights." *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1082 (9th Cir. 1987).

D. This Matter Was Correctly Decided

In an effort to revive their district court victory, plaintiffs naturally defend the district court's analysis, which upon close examination, is not defensible.

1. The District Court's Error

The district court found that "the risk of death is a sufficient injury for * * * [Ms] Elsner and properly a basis of standing if sufficiently connected to [the Act]." Pet. Cert., 59a. The district court reasoned that because Ms Elsner was dying, and because she had experienced depression in the past, she was:

> likely to become depressed and unable to control the timing or severity of that depression. There is

> significant evidence that * * * [Ms Elsner is] at a significant risk of harm due to circumstances beyond her control with the [Act] in effect.

Pet. Cert., 60a (footnote omitted).

Accordingly, the district court found that Ms Elsner had "standing to assert a *facial* challenge." *Id.* (emp. supp.). However, the primary authorities relied upon by the district court to confer standing upon Ms Elsner simply do not support the propositions claimed by the district court.

2. The District Court Was Properly Reversed

a. *Kines v. Day & Dombrowski v. Pfister*

First, the district court has accomplished in one published opinion what federal court plaintiffs have, until today, only dreamed about. For, in the words of the district court--

> it is not necessary to demonstrate a specific or immediate harm when challenging the constitutionality of a statute *on its face*. *Kines v. Day*, 754 F.2d 28, 30 (1st Cir. 1985) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)) [emp. supp.].

Pet. Cert., 57a.

If this is true, then Article III no longer applies to facial challenges. The district court, however, was wrong, and its reliance on *Kines v. Day*, misplaced. Both *Kines v. Day* and *Dombrowski v. Pfister* are free speech cases and the district court

misconstrued an exception that applies only to claims involving free speech. *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) ("[b]ecause of the sensitive nature of constitutionally protected expression * * * [w]e have fashioned this exception to the usual rules governing standing * * * ").

b. *Dimarzo v. Cahill*

Second, the district court writes that--

> One need not wait for the life-threatening event to occur before concluding that a real and present threat exists. *Id.* This rule applies when a plaintiff has little control over whether the life-threatening event will occur. *Id.*

Pet. Cert., 57a-58a, *citing Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) *cert den* 439 U.S. 927 (1978).

The district court once again misstates the law. In *Dimarzo v. Cahill*, the plaintiffs were inmates incarcerated in a structure not safe from fire. Moreover, the inmates introduced evidence of past fires, including one incident where an inmate was trapped by fire. It was due to this *very real, specific, and historically proven threat of fire to jailed inmates* that the First Circuit concluded that "[o]ne need not wait for the *conflagration* before concluding that a real and present threat exists [emp. supp.]." *Dimarzo v. Cahill*, 575 F.2d at 18.

Dimarzo v. Cahill has no application here. First, Ms Elsner is not trapped anywhere by anyone. She has made her wishes known and can identify no one who will harm her. *See* State's

Brief, 5. Secondly, in order for Ms Elsner to bring herself within the reach of *Dimarzo v. Cahill*, she would, at a minimum, need to (i) identify a real and present threat of injury, (ii) establish that it has occurred *to her* in the past, and (iii) further establish that it will occur *to her* again in the future. Ms Elsner has made no such showing, nor can she. Her lack of standing becomes crystal clear once it is realized that her so-called "facts" are in no way related to her personal situation. *See* State's Brief, 5-6.

c. *Allen v. Wright*

Third, and in reliance upon *Allen v. Wright*, 468 U.S. 737, 757-758, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), the district court wrote that plaintiffs do "not lack standing merely because an injury may be an indirect product of a defendant's conduct." (Pet. Cert., 58a). The district court again misstated the law. In *Allen v. Wright*, this Court actually said that:

> the indirectness of the injury may * * * make it *substantially more difficult to meet the minimum requirement of Art. III* * * * .

Id., at 757-58.

Moreover, in *Allen v. Wright*, this Court found against standing, describing plaintiffs' injury as "entirely speculative," "just as speculative," and as "pure speculation" because the alleged injury was *highly indirect*, "result[ing] from some third party not before the court." *Allen v. Wright*, 468 U.S. at 758. The same is true in the instant case, which is why the district court was properly reversed by the court of appeals.

d. *Golden v. Zwickler*

Fourth, the district court wrote that:

> There is no precise test for determining the difference between an abstract question and an Article III controversy, rather it is necessarily a question of degree. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Pet. Cert., 58a.

The plaintiffs in *Golden v. Zwickler* sought a declaratory judgment and injunctive relief from operation of a state statute. This Court found that the circumstances did not present a case or controversy of sufficient "immediacy and reality" and denied relief. Moreover, viewed in its full context, the *Golden v. Zwickler* opinion does not support the district court's analysis:

> The federal courts established pursuant to Article III of the Constitution *do not render advisory opinions*. * * * [Rather,] "*concrete legal issues, presented in actual cases, no abstractions*" *are requisite*. This is as true of declaratory judgments as any other field. The difference between an abstract question and a "controversy" * * * is necessarily one of degree * * * *the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*

Golden v. Zwickler, 394 U.S. at 108 (emp. supp., citations and some quotation marks omitted).

Like the plaintiffs in *Golden v. Zwickler*, the plaintiffs here have not alleged, much less established facts that under *all the circumstances* show that there is a *substantial controversy*, between parties having adverse legal interests of sufficient *immediacy and reality*. In the present case, there is no controversy, much less a "substantial controversy *between [the] parties*." Nor is there any immediacy.

In sum, the district court linked together a series of propositions severely removed from their proper context. Under these circumstances, the district court was properly reversed by the court of appeals. With respect to Ms Elsner, the Ninth Circuit specifically found that her claim was based on a "chain of speculative contingencies." Pet. Cert., 11a. With respect to the other plaintiffs, the Ninth Circuit found that they had "failed to allege a 'concrete and particularized' injury." Pet. Cert., 18a. A few months ago, this Court reaffirmed those principles:

> To meet the standing requirements of Article III, a plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) [emp. orig.]. For our purposes, the italicized words in this quotation from *Allen* are the key ones. We have consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute, and that the alleged

> injury suffered is particularized as to him. *See, e.g., Lujan*, 504 U.S., at 560-561 and n. 1, 112 S.Ct., at 2163 and n. 1 * * * .

Raines v. Byrd, ___ U.S. ___, 117 S.Ct. 2312, 2317 (1997).

Plaintiffs' theory of standing misses this mark by a wide margin. With respect to Ms Elsner, her allegations amount to nothing more than a claim that some*where*, some*time*, some*one* other than the defendants, is going to harm some*one* other than the plaintiffs. With respect to the patients' interests allegedly represented by Drs. Lee and Petty, on this record, we do not know who those patients are, the nature or their circumstances, why they cannot represent their own interests, or if they even exist.

CONCLUSION

This litigation presents interesting policy questions, but simple legal questions. The petition for writ of certiorari should be denied.

Respectfully submitted,

ELI D. STUTSMAN
Counsel of Record
1900 Standard Insurance Center
900 S.W. Fifth Avenue
Portland, OR 97204
(503) 274-4048

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